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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF BELL ATLANTIC

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February 11, 1993

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REPLY COMMENTS OF BELL ATLANTIC[1]

1. Introduction and Summary

The monopoly cable industry seeks to win in this proceeding the battle it lost in Congress. On every critical issue, its reading of the statute would effectively nullify the underlying legislative purpose and leave the incumbent cable monopolists largely free to continue business as usual subject to little meaningful regulatory oversight. If cable had its way in this proceeding, the Commission's rate regulation would codify rather than eradicate the incumbents' monopoly profits and would facilitate rather than restrain their capacity to block new entry into cable markets.

The cable industry is by no means shy -- it takes the most extreme position on every question. While favoring competitive benchmarks to measure the reasonableness of

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac telephone companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company.

current basic-tier rates, cable would exclude from the benchmark calculation prices charged by systems facing the most vigorous competition. Likewise, although demanding upward adjustments in rates to account for anticipated future cost increases, the industry resists price caps similar to those imposed on local telephone companies. Moreover, cable's position reflects an inverted view of the world that conflicts with reality -- it argues that price caps make sense only for the telephone industry which faces rapidly increasing competition, not for the cable industry which Congress found is made up of unregulated entrenched monopolists facing no meaningful competition whatsoever.

There is more. The cable industry would rewrite the statutory prohibition against "unreasonable" rates for non-basic programming services, converting it to a ban only on the rates charged by the highest 2 to 5 percent of all operators regardless of how unreasonable the rest may be. And it would extinguish the requirement that equipment and installation rates be based on "actual cost," leaving cable operators free to price below cost when they want to lock up their subscriber base to frustrate new entrants. Finally, despite Congress's unequivocal intention to extend regulatory protection to all cable consumers in the absence of effective competition, the industry would carve out a potentially limitless exception for areas in which the local franchising authority declines to regulate and therefore chooses not to seek certification from the Commission. In those areas, according to the industry, cable consumers would be protected neither by competition nor by regulation, and the rate abuses that Congress sought to eliminate would continue as if the 1992 legislation had never been enacted.

The Commission should reject these obvious attempts to gut the statute. It should frame its regulations with scrupulous fidelity to the statutory text and the underlying Congressional purpose, and it should remain sensitive to the importance of regulatory parity between the telephone and cable industries as competition between the two increases.[2] Unequal regulatory treatment that puts one industry at an artificial competitive disadvantage will impede a principal goal of the 1992 legislation -- to rely on a competitive

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[2] Nearly every day a new development brings the two industries increasingly into direct competition. See, e.g., Carnevale, "Telephone Service Seems on the Brink of Huge Innovations," Wall Street Journal at A1 (Feb. 10, 1993); Robichaux and Carnevale, "Southwestern Bell Reaches Pact to Break Into Cable TV," Wall Street Journal at B1 (Feb. 10, 1993). The point is made as well by the cable industry in this proceeding. See Comments of Time Warner, App. at 5 ("the [cable] industry may be poised to provide significant competition for the local telephone industry").

marketplace to promote diversity in the availability of cable and other video distribution services.[3]

2. **The Commission's Basic-Tier Regulations Should Embrace Price Caps and Competitive Benchmarks**

The incumbent cable industry devotes much of its resources to resisting price caps. While insisting on mechanisms to allow periodic rate increases, the cable companies refuse to acknowledge that productivity gains may warrant rate decreases. The Commission should reject the industry's effort to enact a one-way escalator that pushes rates up but never down.

The cable incumbents rely on a fragment of legislative history suggesting that Congress did not expect the Commission merely to transfer its common carrier

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[3] Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), § 2(b)(1)-(2). The cable industry itself argues for regulatory parity in an analogous context. They express concern that regulating cable will disadvantage them in competition with other multichannel providers, including SMATV and MMDS. See, e.g., Comments of Adelphia Communications Corp. et al. at 127-28 (expressing concern that regulated cable rates will become "a 'price umbrella' that would protect SMATV and MMDS operators from having to compete vigorously"); Comments of Time Warner at 74-75. Likewise, if local telephone companies are subjected to regulatory restrictions from which cable is immune, consumers will be deprived of truly meaningful and effective competition.

regulations to the cable area.[4] But the Commission has not proposed to make cable operators common carriers, nor has it proposed a wholesale replication of Title II regulation. Nothing in the statute or legislative history prohibits the Commission from drawing on the lessons learned from decades of regulating telephone rates. Indeed, given the increasing convergence of the cable and telephone industries, it would be unreasonable for the Commission to ignore appropriate aspects of its Title II regulatory experience.

The reasons that led the Commission to impose price caps on local telephone companies apply with equal force to cable regulation. First, price caps "create a regulatory environment that requires carriers to become more productive."[5] Steady productivity improvement is likewise a central goal of cable rate regulation: it is a fundamental Congressional policy "to ensure that cable operators continue to expand . . . their capacity and the programs offered over

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[4] See H.R. Rep. No. 628, 102d Cong., 2d Sess. 83 (1992) (hereinafter "House Report") ("The Committee is concerned that several of the terms used in this section are similar to those used in the regulation of telephone common carriers. It is not the Committee's intention to replicate Title II regulation. The FCC should create a formula that is uncomplicated to implement, administer, and enforce, and should avoid creating a cable equivalent of a common carrier 'cost allocation manual.'").

[5] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6789 (Second Report) (released Oct. 4, 1990) (hereinafter "Price Cap Order").

their cable systems."[6] Price caps will promote technological innovation and increased capacity in the cable industry just as they do in the telephone industry.

Second, price caps "mirror[] the efficiency incentives found in competitive markets."[7] The 1992 Cable Act likewise charges the Commission with creating a rate scheme that simulates competitive market forces. The goal of the Commission's regulations must be to ensure against rates "above those that would occur under effective competition."[8]

Third, price caps are relatively easy for regulators to administer compared to more traditional forms of regulation.[9] Congress likewise directed the Commission to craft basic-tier cable rate regulations that minimize "the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission"; and it expressly authorized the Commission to "adopt formulas or other mechanisms" promoting administrative convenience.[10]

Ignoring these obvious parallels, the cable operators focus on distinctions between the cable and

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6 1992 Cable Act, § 2(b)(4).

7 Price Cap Order at 6790.

8 Senate Report at 75; see also 1992 Cable Act § 3(a), 47 U.S.C. § 543(b)(1).

9 In its Price Cap Order, the Commission noted that, before it adopted price caps, it "had to apply its rate of return mechanism to 1400 providers of access." Price Cap Order at 6790. As the Commission has said, that was "not a simple matter." Id. at 6789.

10 1992 Cable Act § 3(a), 47 U.S.C. § 543(b)(2)(A)-(B).

telephone industries that supposedly make a price cap regime appropriate only for the latter. For example, they say that the investment pattern for cable and telephone companies is different.[11] In reality, however, cable companies and telephone companies are investing in the same technologies -- primarily fiber optics.[12] To the extent that an expanding fiber optic network will permit telephone companies to convey telecommunications more efficiently, it will likewise allow cable systems to transmit video signals with increasing efficiency.[13] Price caps including a productivity factor are no less suitable for the cable industry than for local telephone companies.

The cable companies also contend that the telephone industry is bloated by "personnel built up over decades of

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[11] Comments of Continental Cablevision at 24.

[12] Comments of Bell Atlantic at 2-3; see also Brown, "Operators Plan Growth Along Fiber Lines," Broadcasting at 29 (Feb. 1, 1993) ("Three out of four cable operators say they plan to expand channel capacity, and most of them intend to do so through fiber optic technology...."); Fahri, "Time Warner Plans 2-Way Cable System," Washington Post at F1 (Jan. 27, 1993) (reporting that Time Warner will "create a 'full service network'" offering "interactive entertainment, education, home shopping and telecommunications services on demand"). Cable industry comments in this proceeding confirm that fiber optic technology provides, at "reduced cost," "an ideal solution to support CATV delivered two-way interactivity in the home." Comments of Comcast Corp., App. at 3-4.

[13] Although cable concedes it is deploying the same technologies as telephone companies, the cable incumbents claim they are different than telephone companies in several "financial" respects that weigh against applying price caps. As is explained in the Appendix, however, cable's arguments are either irrelevant or actually weigh in favor of applying to cable a type of price cap regulation similar to that which already applies to telephone companies.

noncompetitive 'cost-plus' pricing."[14] Whereas telephone companies have "efficiencies to gain," they argue, cable is already an engine of productivity.[15] They portray the telephone companies as "fat" monopolies who need price caps to prod them into becoming more efficient, while cable is a fledgling industry that does not require productivity incentives.

The argument is nonsense. In its Price Cap Order, the Commission noted that the telephone companies, in much of their business, no longer enjoy monopoly power.[16] The increasing competition for telephone services over the past decade has made telephone companies substantially more productive and efficient. By contrast, Congress enacted the 1992 Cable Act because it found that the cable industry today is an unregulated monopoly with neither competitive restraints on its prices, nor competitive prods to improve its productivity or efficiency.

Unlike telephone companies, however, cable rates have not historically been subject to regulation and the Commission must ensure that cable rates are reasonable before putting price caps in place. The comments reflect a broad consensus that the best way to determine the reasonableness of basic-tier rates is through benchmarks based on prices charged

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[14] Comments of Continental Cablevision at 25-26.

[15] Id. at 25.

[16] Price Cap Order at 6790.

by cable systems subject to competition.[17] The benchmark should be a per channel average of rates currently charged by competitive cable systems. Basic-tier rates that fall below the benchmark could be presumed reasonable absent a contrary showing; those that exceed the benchmark should be presumed unreasonable subject to the operator's opportunity to justify its rates based on a cost-of-service showing.[18]

Contrary to the claims of some parties, there are enough competitive systems from which to develop a meaningful and representative benchmark.[19] In 1990, the Commission found that there were "40 to 49 directly competitive systems in operation."[20] While that number may seem relatively small

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[17] See, e.g., NCTA Comments at 10 (corrected copy filed Jan. 28, 1993); Comments of Continental Cablevision at 29; Comments of Bell Atlantic at 7; Comments of GTE at 6.

[18] In any cost-of-service proceeding to establish reasonable cable rates, however, the Commission should make clear that cable operators are only entitled to earn a return on a reasonable value for the assets of the cable system, and not on the portion of any purchase price for the cable system that is attributable to a monopoly premium. See Appendix at A-4. Moreover, the Commission should make clear that cable operators must exclude any lobbying expenses in setting reasonable rates, and should require cable operators to report their lobbying expenditures in the same manner as telephone companies. See, e.g., Katz, "Money for Nothing," Cablevision at 26 (Dec. 24, 1992) (NCTA spending $10 million a year to polish cable's image).

[19] NCTA Comments at 17; Comments of Nashoba Communications United Partnership at 55.

[20] Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, Report at 52 (released July 31, 1990) (hereinafter "1990 Report").

in comparison to the total number of cable systems in the nation, it provides a large enough and diverse enough universe from which to derive a reliable average. The competitive systems are of varying sizes and technological maturity and are found in all regions of the country. Some service only small towns, while others compete in franchise areas with over 100,000 residents.[21] Some cable operators subject to competition first began providing service in the 1950's; others are new entrants into the market.[22] The list of competing systems also includes the most prominent names in the industry, such as TCI, Comcast, and Telesat, as well as small local companies.[23] Given this broad range of characteristics, these systems are sufficiently representative of the overall cable industry that a per channel average of their rates will provide a meaningful benchmark against which

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[21] For example, the Commission's 1990 Report found that there were competitive systems in Vidalia, Ga. -- a town of only a few thousand -- as well as in Allentown, Pa., Huntsville, Ala., and Mesa, Ariz. -- cities with considerably larger populations. 1990 Report, App. H at 1-2.

[22] See id.

[23] See id.

to measure the reasonableness of current rates before imposing price caps.[24]

The cable industry asserts that competitive systems' rates may be "artificially low" and therefore unreliable as benchmarks.[25] New entrants in competitive franchise areas, the argument goes, commonly fix their rates "below a competitive level" in order to gain market share -- all in an effort "ultimately to be purchased by the more established competitor."[26] This turns reality on its head. While there have in fact been claims of predatory pricing in some competitive markets, the allegations have been directed at incumbent operators seeking to thwart competitive entry.[27]

The effect of ignoring lower rates would be to exclude from the competitive benchmark calculations the

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[24] Some cable companies suggest that the Commission should consider a rate presumptively reasonable if it does not exceed the highest rate charged by any competitive system, e.g., NCTA Comments at vi (rates for competitive systems would form a "zone of reasonableness"), and even argue that rates within some arbitrary range above this level should be presumed reasonable, id. at 16. But there is no reason to assume that the highest rate is any more representative of a competitive level than the lowest. The best measure is an average that takes into account the full spectrum of rates charged by all competitive systems, and rates above this benchmark should not be presumed reasonable.

[25] NCTA Comments at 17; see also, e.g., Comments of Adelphia Communications Corp., et al. at 56-57; Comments of Cole, Raywid & Braverman at 20-21.

[26] NCTA Comments at 18 (emphasis in original).

[27] See, e.g., Robichaux, "Cable Firms Say They Welcome Competition But Behave Otherwise," Wall Street Journal at A1 (Sept. 24, 1992) ("entrenched cable operators have sought to lock out or cripple would-be competitors" by engaging in "disabling price wars").

systems subject to the most robust competition -- those that are likely to provide the most reliable indication of competitive price levels. If the NCTA wishes to identify which of its members have engaged in predatory pricing in a particular franchise area, the Commission can consider whether to exclude those systems' rates in computing a benchmark. Otherwise, there is no basis for presuming that price levels in a competitive locality should be disregarded.[28]

3. **The Commission Must Regulate Basic-Tier Rates Where A Local Franchising Authority Declines to Regulate**

In an attempt to create a regulatory no-man's land, the cable companies assert that the Commission has no power to regulate basic-tier rates where a local franchising authority itself decides not to regulate.[29] That would leave cable operators in those localities utterly free of regulation -- and their subscribers completely unprotected from rate abuses -- despite the absence of effective competition. Such a regulatory gap is wholly at odds with the statutory scheme and

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[28] The statute flatly forecloses the suggestion of some cable companies that an incumbent system should be allowed to charge lower rates where it faces competition. A cable operator's rate structure must be "uniform throughout the geographic area in which cable service is provided over its cable system." 47 U.S.C. § 543(d). Congress plainly intended to bar the practice, used by some cable companies to block competitive entry, of cutting prices only in neighborhoods or on particular streets where a would-be competitor provides service. See Robichaux, "Cable Firms Say They Welcome Competition But Behave Otherwise," Wall Street Journal at A1 (Sept. 24, 1992).

[29] NCTA Comments at 64; Comments of Comcast at 16-17; Comments of Cole, Raywid & Braverman at 12-13.

leads to absurd results that Congress could not possibly have sanctioned.

The cable companies rely on section 623(a)(2), entitled "Preference for Competition." True to its title, that section provides that there shall be no regulation if the Commission finds that a cable system is subject to effective competition. If the Commission finds to the contrary, however, basic-tier rates "shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6)."[30] Because paragraph (6) authorizes the Commission to regulate if it either initially "disapproves" or later "revokes" a local franchising authority's certification, the cable companies argue that the Commission "has no independent authority to step in and regulate those rates" where a franchising authority merely "elects not to apply for certification."[31]

The negative inference that the companies seek to draw from this provision does not withstand analysis. The purpose of section 623(a)(2) is clear. It forecloses regulation if there is competition, but requires regulation if there is no competition. It also determines how regulatory responsibility is divided between local authorities and the Commission. The section evinces absolutely no intent, however, to create a regulatory void in which there will be

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30 47 U.S.C. § 543(a)(2)(A).

31 NCTA Comments at 64.

neither regulation nor competition. That result would be antithetical to the express terms of the statute as a whole and to the overarching Congressional purpose.

Among the guiding policies of the 1992 Cable Act are (1) "where cable television systems are not subject to effective competition, [to] ensure that consumer interests are protected in receipt of cable service," and (2) to "ensure that cable television operators do not have undue market power vis-a-vis . . . consumers."[32] Those policies are specifically implemented for basic-tier service in section 623(b)(1), entitled "Commission Obligation to Subscribers," which provides: "The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed [competitive] rates."[33] "[S]ubscribers of any cable system" obviously includes subscribers whose local franchising authority declines to regulate. Thus, the notion that the statute implicitly creates a regulatory vacuum in which some subscribers are left wholly unprotected -- at the mercy of cable monopolists who are free to exert "undue market

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[32] 1992 Cable Act § 2(b)(4)-(5).

[33] 47 U.S.C. § 543(b)(1) (emphasis added).

power" without regulatory constraint -- is at war both with the statute's stated policy and with its explicit terms.[34]

Even where a local franchising authority exercises the regulatory power, it must do so "in accordance with the regulations prescribed by the Commission."[35] Having deprived local authorities of power to regulate under a relaxed standard, Congress could hardly have intended to delegate to local authorities the power to dispense with regulation altogether simply by declining to apply for certification.[36]

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[34] The legislative history supports the statute's plain meaning. The Conference Committee "amend[ed]" the legislation "to state <u>specifically</u> that the Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable, and that the goal of such regulations is to protect subscribers of <u>any</u> cable system that is not subject to effective competition from [excessive] rates." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 62 (1992) (emphasis added). That amendment reflected an amalgamation of the Senate bill, which had vested in the Commission primary authority to regulate local rates, and the House version, which preferred regulation in the first instance by local franchising authorities. The Conference Committee retained the House bill's overall preference for local regulation of basic-tier rates, but it amended the bill to confirm that the Commission in all cases would provide ultimate protection from unreasonable rates. The cable companies simply ignore this amendment. Indeed, their construction of the statute renders it meaningless -- an unlikely reading of a change specifically highlighted in the Conference Report.

[35] 47 U.S.C. § 543(a)(2)(A).

[36] Furthermore, the cable companies cannot dispute that section 623(a)(2)(B) authorizes the Commission to regulate the rates for cable programming services even where the local authority has declined to seek certification. Thus, their tortured reading of the statute creates yet another anomaly -- localities where basic-tier service will be completely unregulated (despite the absence of competition) but where cable programming services will be regulated by the FCC.

There may well be situations in which a local franchising authority declines to seek certification -- for example, where it is already overburdened with its other duties or where a cable operator has sufficient political clout to persuade it to forgo regulation. It is precisely in those kinds of situations that cable subscribers' need for protection is greatest. It is inconceivable that Congress, in enacting comprehensive legislation to address that need, would have chosen to let those subscribers fall through a gaping hole in the statute's mantle of protection.[37]

4. The Commission Should Apply Price Caps to Rates for Higher Tiers Of Programming Services

The statute provides that the "Commission shall, by regulation, establish . . . criteria . . . for identifying, in individual cases, rates for cable programming services that

[37] Contrary to the assertions of the cable incumbents, a common carrier providing video dial tone service does not qualify as a "multichannel video programming distributor." Only an entity providing programming services over a video dial tone network -- not the common carrier whose network is used -- "makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(12). Whether such a provider offers "effective competition" to a cable system depends on whether it provides "comparable" video programming, 47 U.S.C. § 543(l)(1)(B), in terms of both the type and quantity of programming it delivers. For example, a video on demand service delivering pre-recorded programming is an imperfect substitute for live cable programming and, while it will compete with pay channels and pay per view, will not constrain basic cable rates. And the NCTA itself argues that alternative programmers offering only a handful of channels would be at a "ruinous disadvantage" when they go up against the incumbents' more extensive programming packages. See Petition to Deny of NCTA in In re Application of New Jersey Bell, W-P-C 6840 at 5 (Jan. 22, 1993).

are unreasonable."[38] The most sensible approach is to apply competitive benchmarks and price caps in a manner that parallels basic-tier regulation. That is the most efficient and effective way to implement the Commission's statutory responsibilities, and it offers the best protection against the risk that cable operators will seek to evade rate regulation by retiering.[39]

The cable operators, in large measure, seek to write the provision out of the statute. In their view, the provision was intended merely "to catch the bad actors that charge egregious rates"[40] and to "rein in only the true renegades."[41] To that end, NCTA urges the Commission to deem "unreasonable" only those programming rates "'which ranked among the highest few percent (e.g., top 2-5 percent).'"[42]

The Commission should reject these efforts to eviscerate programming rate regulation. The statute provides that cable operators shall not charge "unreasonable" programming rates, not that they are prohibited from charging "egregious" or "abusive" rates. The Senate said that "'[u]nreasonable' rates are those that are above those that

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[38] 1992 Cable Act § 3(a), 47 U.S.C. § 543(a)(c)(1)(A).

[39] See 47 U.S.C. § 543(h).

[40] Comments of Comcast Corporation at 32 (emphasis in original).

[41] NCTA Comments at 60.

[42] Id. at 59 (quoting Commission's Notice of Proposed Rulemaking ¶ 46).

would occur under effective competition."[43] Whether a cable system's programming rates are above or below the 95th percentile of rates charged by all other monopolist cable systems has nothing at all to do with whether they are higher than would occur in a competitive market.

Similarly, to determine whether programming rates are lawful, the statute demands that the Commission weigh such factors as the rates charged by cable operators "that are subject to effective competition" and "the capital and operating costs of the cable system."[44] Whether an operator's rates are among the top 2 to 5 percent has no relation to the statutory factors. Under this approach, the entire cable industry could double its rates for non-basic programming services, but no matter how egregiously unjustified those increases might be if measured by reference to the considerations spelled out in the statute, the Commission could find "unreasonable" only the very highest of the high. This would lead to a cable version of "The Price Is Right," under which every company has an incentive to set its rates as close as possible to the 95th (or 98th) percentile

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[43] Senate Report at 75.

[44] Cable Act § 3(a), 47 U.S.C. § 543(c)(2)(B), (E).

but no higher. Neither the statute nor common sense supports a system that institutionalizes such perverse incentives.[45]

5. Cable Equipment Should Be Provided on an Unbundled, Competitive Basis

The statute provides that the Commission's basic-tier regulations "shall include standards to establish, on the basis of actual cost, the price or rate for . . . installation and lease of the equipment used by subscribers to receive the basic service tier."[46] The unbundling of equipment and installation services from the provision of other cable services should promote healthy competition in which market forces keep rate levels close to "actual cost" (including a reasonable profit).[47]

The cable operators, however, uncharacteristically express concern that unbundling will offer them the

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[45] The cable industry's open-ended definition of "unreasonableness" would also encourage cable operators to shift the most attractive programming away from the basic tier to take full advantage of the limitless upside opportunities in the non-basic tiers. Thus, if they persuade the Commission to reject strong measures for controlling programming prices, the cable operators will succeed in avoiding regulation over the largest segment of their services.

[46] 1992 Cable Act § 3(a), 47 U.S.C. § 543(b)(3).

[47] Cable companies themselves emphasize the similarities between equipment and installation provided by telephone companies and cable, and applying similar rules to both industries will establish a measure of regulatory parity. See, e.g., Comments of Adelphia at 77; Comments of Time Warner at 61. This means the Commission should also require cable operators to expense the cost of all new installations, just as it has done for the telephone industry. See, e.g., Detariffing the Installation and Maintenance of Inside Wiring, CC Dkt 79-105, Second Report and Order at 2-3 (released Feb. 24, 1986).

opportunity to recover through equipment and installation fees the exorbitant profits that they will no longer earn on basic service.[48] But competition from new and existing participants in the equipment and installation markets will prevent such overreaching. So long as cable operators inform prospective subscribers that third parties can provide equipment and installation, subscribers will turn to the most economical provider.[49] To the extent that markets for equipment and installation services are not yet competitive, the solution is to adopt interim cost-of-service regulation, not to permit cable operators to continue bundling with basic-tier service.[50]

While the Commission should largely rely on the competitive marketplace to restrain rates for equipment and service, the statute mandates that it must expressly prohibit below-cost pricing. The statute leaves no room for exceptions -- it provides without qualification that the Commission's regulations "shall" prescribe rate standards "on the basis of actual cost." There are good reasons for that unequivocal

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[48] NCTA Comments at 47.

[49] The Commission's regulations should require cable operators to provide such notice, and should provide specific penalties for noncompliance.

[50] If cable's real interest were to increase penetration as it claims, see NCTA Comments at 52-53; Cablevision Industries Comments at 33, reducing their rates to competitive levels is the answer. The Commission has estimated that "if competition is introduced nationwide, subscribership would likely expand by 11.2 million households." Report of the FCC Regarding the President's Regulatory Reform Program at 16 (Apr. 28, 1992).

requirement. Congress obviously did not want to leave cable operators free to subsidize their equipment and installation services out of the rates charged for cable services. Nor did it wish to give existing cable operators an additional potent weapon to use in stifling new competition in their markets. Providing below-cost equipment and installation, particularly in localities where effective competition has not yet been introduced, will allow the incumbent monopolists to lock up their customer base and make it far more difficult for new entrants to penetrate the market.

Finally, the Commission must reject the efforts of the cable incumbents to obtain a competitive advantage by entering into long term exclusive contracts at preferential rates with the owners or managers of multiple dwelling units, such as apartments or condominiums.[51] Not only does this practice run afoul of the statute's bar against charging different rates within the same franchise area,[52] but it also forecloses competitors from obtaining access to the building and denies residents the ability to choose between competing sources of video programming. Accordingly, the Commission should expressly prohibit the use of such long term exclusive contracts.

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[51] See, e.g., Comments of Cole, Raywid & Braverman at 49; Comments of TCI at 61.

[52] See supra n. 26.

CONCLUSION

To ensure that cable operators are subject to effective rate regulation in accordance with the statute, and to achieve a reasonable measure of regulatory parity between the cable and telephone industries, the Commission should apply to the cable industry principles of rate regulation similar to those applied to local telephone companies, including the imposition of price caps designed to encourage increased productivity.

Respectfully submitted,

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APPENDIX

SUPPOSED FINANCIAL DIFFERENCES BETWEEN TELEPHONE COMPANIES AND CABLE DO NOT WEIGH AGAINST PRICE CAP REGULATION OF CABLE

The comments of the cable incumbents claim that they are deploying the same advanced technologies as telephone companies, and are moving rapidly to provide telephone services over their cable systems. Despite their concessions that they are no different than telephone companies in terms of the technologies being deployed or the services they seek to provide, in an effort to avoid any meaningful regulation of their monopoly rates the cable incumbents argue that they are different than telephone companies in several "financial" respects.[1]

These "financial" differences, however, are either irrelevant or actually weigh in favor of applying to cable a type of price cap regulation similar to that which already applies to telephone companies.

1. Cable investors' rewards usually occur through system growth and capital appreciation, not through dividends which would otherwise burden subscription rates.[2]

Contrary to cable's claims, the decision whether to reinvest profits or to pay dividends has no impact on the rates charged to subscribers or on the value of the firm.[3] Moreover, applying price caps to cable will promote reinvestment in new technologies that will improve productivity and efficiency, and applying a productivity factor such as already applies to telephone companies will actually produce lower rates in real terms.

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[1] E.g., Comments of Cole, Raywid & Braverman at 22 ("The underlying financial organization of the cable industry distinguishes it from telephone so thoroughly that even 'alternative forms' of telephone regulation would be poor substitutes.").

[2] Comments of Continental Cablevision at 23.

[3] See Modigliani & Miller, "Dividend Policy, Growth, and the Valuation of Shares," 34 The Journal of Business of the University of Chicago at 411-33 (Oct. 1961).